

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

THOMAS M. JAMES,	)	
	)	
Plaintiff,	)	Case No. 1:13-cv-541-WTL-TAB
	)	
vs.	)	
	)	
LORENZO ELI, et al.,	)	
	)	
Defendants.	)	

**Entry Denying Motion to Dismiss and Directing Further Proceedings**

**I.**

Defendant Dr. Villanustre filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*. The Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is based on Dr. Villanustre's view of the complaint as having asserted a medical malpractice claim. The plaintiff has responded to the motion to dismiss. He correctly points out that his claims in this action are not brought under state law. Rather, they are brought pursuant to the Eighth Amendment to the Constitution. The plaintiff's complaint against Dr. Villanustre alleges deliberate indifference to a serious medical need, a claim over which the Court has subject matter jurisdiction. The Rule 12(b)(1) motion to dismiss [dkt. no. 11] is **denied**.

**II.**

As to the Rule 12(b)(6) motion, Dr. Villanustre argues that the complaint is barred under the doctrine of *res judicata* and therefore fails to state a claim upon which relief can be granted. Dr. Villanustre argues that the elements of *res judicata* are satisfied because plaintiff's claims are identical to those brought in a state court medical malpractice action, although Dr. Villanustre

was not identified by name in the state court complaint. The Rule 12(b)(6) motion relies on materials outside the pleadings. Therefore, that motion [dkt. no. 11] is **denied without prejudice** because it was not presented as a motion for summary judgment. *See* Rule 12(d) of the *Federal Rules of Civil Procedure*. Because Dr. Villanustre has not yet answered the complaint, the Court will not convert the motion to dismiss to a motion for summary judgment at this stage of the litigation.

### **III.**

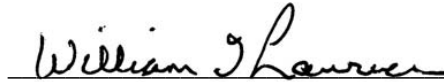
Dr. Villanustre shall have **through January 10, 2014**, in which to answer or otherwise respond to the complaint.

**IT IS SO ORDERED.**

Date: 12/12/2013

Distribution:

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A handwritten signature in cursive script, reading "William T. Lawrence", written over a horizontal line.

Hon. William T. Lawrence, Judge  
United States District Court  
Southern District of Indiana

All electronically registered counsel